

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term 2006
5 (Argued: October 11, 2006 Decided: April 24, 2007)
6 (Amended: April 10, 2008)
7 Docket No. 06-0086-cv
8 -----x

9 ARBOR HILL CONCERNED CITIZENS NEIGHBORHOOD
10 ASSOCIATION, ALBANY COUNTY BRANCH OF THE NATIONAL
11 ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
12 AARON MAIR, MARYAM MAIR, AND MILDRED CHANG,
13

14 Plaintiffs-Appellants,

15 -- v. --
16
17

18 COUNTY OF ALBANY AND ALBANY COUNTY BOARD OF
19 ELECTIONS,
20

21 Defendants-Appellees,

22 -- and --
23
24

25 THE REPUBLICAN CAUCUS OF THE ALBANY COUNTY
26 LEGISLATURE,
27

28 Intervenors.
29
30 -----x

31
32 B e f o r e : JACOBS, Chief Judge, WALKER, Circuit Judge,
33 O'CONNOR, Associate Justice Retired.*

34 Appeal from an order of the United States District Court for
35 the Northern District of New York (Norman A. Mordue, Judge)
36 granting in part and denying in part plaintiffs-appellants'
37 motion for attorney's fees.

38 AFFIRMED.

1 * The Honorable Sandra Day O'Connor, Associate Justice
2 (Retired) of the United States Supreme Court, sitting by
3 designation.

1 MITCHELL A. KARLAN (Mark E. Bini
2 and Michelle Craven, on the brief),
3 Gibson, Dunn & Crutcher, LLP, New
4 York, New York, for Plaintiffs-
5 Appellants.
6

7 THOMAS J. O'CONNOR, Napierski,
8 Vandenburg & Napierski, LLP,
9 Albany, New York, for Defendants-
10 Appellees.
11

12 **AMENDED OPINION¹**

13 JOHN M. WALKER, JR., Circuit Judge:

14 In this appeal from the district court's disposition of
15 their motion for an award of attorney's fees, plaintiffs-
16 appellants ("plaintiffs"), who prevailed in a suit brought under
17 the Voting Rights Act of 1965 ("VRA"), seek a recalculation of
18 the amount that they may recoup. The fee -- historically known
19 as the "lodestar" -- to which their attorneys are presumptively
20 entitled is the product of hours worked and an hourly rate.

21 Plaintiffs argue that the district court applied an unnecessarily
22 strict "forum rule": The district court, they contend, required
23 them to show extraordinary special circumstances before it would
24 use in its "lodestar" calculation an hourly rate greater than the
25 hourly rate charged by attorneys in the district where the
26 district court sits.

27 We agree that the district court may have applied the forum
28 rule in too unyielding a fashion. We therefore clarify its

1 ¹ After due consideration of Plaintiffs-Appellants' petition
2 for rehearing, which is denied, we have sua sponte amended our
3 opinion.

1 proper application in this circuit: While the district court
2 should generally use the prevailing hourly rate in the district
3 where it sits to calculate what has been called the "lodestar" --
4 what we think is more aptly termed the "presumptively reasonable
5 fee" -- the district court may adjust this base hourly rate to
6 account for a plaintiff's reasonable decision to retain out-of-
7 district counsel, just as it may adjust the base hourly rate to
8 account for other case-specific variables.

9 Moreover, this dispute concerning the "forum rule" is but a
10 symptom of a more serious illness: Our fee-setting jurisprudence
11 has become needlessly confused -- it has come untethered from the
12 free market it is meant to approximate. We therefore suggest
13 that the district court consider, in setting the reasonable
14 hourly rate it uses to calculate the "lodestar," what a
15 reasonable, paying client would be willing to pay, not just in
16 deciding whether to use an out-of-district hourly rate in its fee
17 calculation. A plaintiff bringing suit under the Voting Rights
18 Act, pursuant to which fees can be recovered from the other side,
19 has little incentive to negotiate a rate structure with his
20 attorney prior to the litigation; the district court must act
21 later to ensure that the attorney does not recoup fees that the
22 market would not otherwise bear. Indeed, the district court
23 (unfortunately) bears the burden of disciplining the market,
24 stepping into the shoes of the reasonable, paying client, who
25 wishes to pay the least amount necessary to litigate the case

1 effectively.

2 Bearing these background principles in mind, the district
3 court should, in determining what a reasonable, paying client
4 would be willing to pay, consider factors including, but not
5 limited to, the complexity and difficulty of the case, the
6 available expertise and capacity of the client's other counsel
7 (if any), the resources required to prosecute the case
8 effectively (taking account of the resources being marshaled on
9 the other side but not endorsing scorched earth tactics), the
10 timing demands of the case, whether an attorney might have an
11 interest (independent of that of his client) in achieving the
12 ends of the litigation or might initiate the representation
13 himself, whether an attorney might have initially acted pro bono
14 (such that a client might be aware that the attorney expected low
15 or non-existent remuneration), and other returns (such as
16 reputation, etc.) that an attorney might expect from the
17 representation.²

1 ² Our decision today in no way suggests that attorneys from
2 non-profit organizations or attorneys from private law firms
3 engaged in pro bono work are excluded from the usual approach to
4 determining attorneys' fees. The reasonableness of a fee award
5 does not depend on whether the attorney works at a private law
6 firm or a public interest organization, see Blum v. Stenson, 465
7 U.S. 886, 894 (1984) ("Congress did not intend the calculation of
8 fee awards to vary depending on whether plaintiff was represented
9 by private counsel or by a nonprofit legal services
10 organization."), nor is the award necessarily limited because the
11 attorney has agreed to undertake the case for a reduced fee
12 compared to the customary market rate, see Reiter v. MTA N.Y.
13 City Transit Auth., 457 F.3d 224, 233 (2d Cir. 2006).
14 Nevertheless, the nature of representation and type of work
15 involved in a case are critical ingredients in determining the
16 "reasonable" hourly rate. See, e.g., Blum, 465 U.S. at 895 n.11

1 Although we clarify the application of the forum rule, we
2 affirm the judgment of the district court in this case. It is
3 clear that the district court would adhere to its fee award were
4 we to vacate the district court's judgment and remand for
5 reconsideration. Indeed, we believe that a reasonable, paying
6 resident of Albany would have made a greater effort to retain an
7 attorney practicing in the Northern District of New York, whether
8 in Syracuse, Binghamton, Utica, or Kingston, than did plaintiffs.
9 The rates charged by attorneys practicing in the Southern
10 District of New York would simply have been too high for a
11 thrifty, hypothetical client -- at least in comparison to the
12 rates charged by local attorneys, with which he would have been
13 familiar.

1 ("[R]equested rates [must be] in line with those prevailing in
2 the community for similar services" (emphasis added));
3 see also Cohen v. W. Haven Bd. of Police Comm'rs, 638 F.2d 496,
4 506 (2d Cir. 1980) ("The fees that would be charged for similar
5 work by attorneys of like skill in the area [is] the starting
6 point for determination of a reasonable fee award."); Pastre v.
7 Weber, 800 F. Supp. 1120, 1125 (S.D.N.Y. 1991) (finding force in
8 the "argument that [defendant] should not be required to pay for
9 legal services at the rate Hughes Hubbard would charge to [its
10 corporate clients] . . . but should . . . compensate plaintiff
11 only for what would have been charged by a competent attorney
12 specializing in civil rights litigation"). These factors may
13 justify compensating an attorney at a rate lower than his or her
14 customary rate for a different type of practice, regardless of
15 whether the attorney has agreed to take the case on a pro bono or
16 reduced-fee basis. All we are holding is that in calculating the
17 reasonable hourly rate for particular legal services, a district
18 court should consider all relevant circumstances in concluding
19 what a reasonable client would expect to pay. Thus, attorneys -
20 regardless of whether they are pursuing litigation on behalf of a
21 paying client or a non-paying client - should receive out-of-
22 district fees only if a reasonable, paying client would have
23 retained out-of-district counsel.

1 **BACKGROUND**

2 On April 22, 2003, plaintiffs filed a complaint against
3 Albany County and its Board of Elections ("Albany defendants")
4 alleging that Albany County's 2002 legislative redistricting plan
5 violated § 2 of the Voting Rights Act of 1965. See 42 U.S.C. §
6 1973. On August 22, 2003, the District Court for the Northern
7 District of New York (Mordue, Judge) enjoined Albany County from
8 conducting its scheduled November 2003 election pending adoption
9 by the Albany County Legislature of a revised redistricting plan.

10 Further proceedings below culminated in the district court's
11 rejection of plaintiffs' request that it order Albany County to
12 hold a special election to take the place of the enjoined
13 November 2003 election; plaintiffs then appealed to this court.
14 On January 28, 2004, we vacated the district court's judgment and
15 ordered the County to hold the special election on March 2, 2004.
16 See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of
17 Albany, 357 F.3d 260 (2d Cir. 2004) ("Arbor Hill I").

18 Plaintiffs then moved in this court for an award of
19 attorney's fees under 42 U.S.C. § 1973l(e). While we
20 acknowledged the merit of the motion in principle, we remanded
21 for a determination of the appropriate fee. See Arbor Hill
22 Concerned Citizens Neighborhood Ass'n v. County of Albany, 369
23 F.3d 91 (2d Cir. 2004) ("Arbor Hill II"). We noted that
24 plaintiffs had not demonstrated that "special circumstances
25 existed" that would justify the use of higher rates than those

1 prevailing in the Northern District of New York in calculating
2 that fee. Arbor Hill II, 369 F.3d at 96 (quoting In re "Agent
3 Orange" Prods. Liab. Litig., 818 F.2d 226, 232 (2d Cir. 1987)).

4 During the course of this litigation, three entities have
5 rendered legal services to the plaintiffs: (1) the Albany law
6 firm of DerOhannesian & DerOhannesian ("D&D"), as local counsel;
7 (2) the Washington, D.C.-based non-profit Lawyer's Committee for
8 Civil Rights Under Law ("LCCRUL"), selected for its voting rights
9 expertise; and (3) the Manhattan law firm of Gibson, Dunn &
10 Crutcher ("Gibson Dunn"), chosen because of the firm's practice
11 before the Second Circuit and the firm's "muscle," specifically,
12 its ability to quickly prepare the appeal on an abbreviated
13 briefing schedule.

14 Gibson Dunn sought in the district court to recoup
15 attorney's fees calculated on the basis of the hourly rate
16 charged by most attorneys in the Southern District of New York
17 (and the hourly rate usually charged by Gibson Dunn). The
18 district court denied Gibson Dunn's request that it adjust the
19 hourly rate it would use to calculate the fees due from that
20 prevalent in the Northern District of New York. The district
21 court explained, "[i]t is undisputed that plaintiffs did not even
22 attempt to contact attorneys or law firms in the Northern
23 District of New York outside of Albany County insofar as
24 obtaining representation in this matter." Noting that "it was
25 plaintiffs['] obligation to submit factual support for their

1 claim that there were no [law firms in Syracuse, Binghamton,
2 Utica or Kingston] ready, willing or able to take [their] case,"
3 the district court held that plaintiffs had not adequately
4 justified their request for higher fees.

5 In addition, the district court reduced the fee award
6 proposed by Gibson Dunn in various other respects not relevant to
7 this appeal. Plaintiffs then timely appealed the fee award,
8 challenging only the district court's decision to award Gibson
9 Dunn a fee based on the hourly rate commonly charged in the
10 Northern District.

11 ANALYSIS

12 I. A Brief History of Attorney's Fees Awards

13 Courts in the United States have historically applied the
14 "American Rule," under which each party is to bear its own costs
15 of litigation, unmitigated by any fee-shifting exceptions. See
16 Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240,
17 247 (1975). In 1976, however, Congress enacted the Civil Rights
18 Attorney's Fees Awards Act, which, like the provision of the VRA
19 at issue in this appeal, provided that prevailing parties could
20 recoup "reasonable attorney's fee[s]." See 42 U.S.C. § 1988(b);
21 cf. 42 U.S.C. § 19731(e) ("In any action or proceeding to enforce
22 the voting guarantees of the fourteenth or fifteenth amendment,
23 the court, in its discretion, may allow the prevailing party . .
24 . a reasonable attorney's fee").

25 In the accompanying Senate Report, Congress implicitly

1 endorsed two existing methods of calculating the "reasonable fee"
2 that were developed in the 1970s by the circuit courts.

3 See Hensley v. Eckerhart, 461 U.S. 424, 429-30 & n.3 (1983). The
4 first, developed by the Third Circuit, was the "lodestar" method.
5 See Lindy Bros. Builder, Inc. v. Am. Radiator & Standard Sanitary
6 Corp., 487 F.2d 161 (3d Cir. 1973). The lodestar was the product
7 of the attorney's usual hourly rate and the number of hours
8 worked. See id. at 167 (directing district courts to calculate
9 the lodestar using the attorney's "normal billing rate"); see
10 also City of Burlington v. Dague, 505 U.S. 557, 559 (1992).

11 After determining the lodestar, the district court could adjust
12 it in setting the reasonable fee. See generally Hensley, 461
13 U.S. at 433 ("The most useful starting point for determining the
14 amount of a reasonable fee is the number of hours reasonably
15 expended on the litigation multiplied by a reasonable hourly
16 rate. This calculation provides an objective basis on which to
17 make an initial estimate") (emphasis added); Lindy, 487
18 F.2d at 168-69. Thus, the lodestar method involved two steps:
19 (1) the lodestar calculation; and (2) adjustment of the lodestar
20 based on case-specific considerations.

21 The second method, developed by the Fifth Circuit, was for
22 district courts to consider twelve specified factors to establish
23 a reasonable fee. See Johnson v. Ga. Highway Express, Inc., 488
24 F.2d 714 (5th Cir. 1974),³ abrogated on other grounds by

1 ³ The twelve Johnson factors are: (1) the time and labor
2 required; (2) the novelty and difficulty of the questions; (3)

1 Blanchard v. Bergeron, 489 U.S. 87, 92-93, 96 (1989) (declining
2 to limit fee award to amount stipulated in attorney-client
3 agreement). The Johnson method differed from the lodestar method
4 in that it contemplated a one-step inquiry.

5 These two circuits had sought to channel the district
6 court's discretion in different ways. The lodestar method was
7 consistent with the law firm practice of accounting for each
8 billable hour. See Lindy, 487 F.2d at 167 ("[T]he first inquiry
9 of the court should be into the hours spent by the attorneys . .
10 . ."); see also Gisbrecht v. Barnhart, 535 U.S. 789, 800-01
11 (2002) ("As it became standard accounting practice to record
12 hours spent on a client's matter, attorneys increasingly realized
13 that billing by hours devoted to a case was administratively
14 convenient . . ."). When the lodestar did not accurately
15 reflect the market, the district court retained authority to
16 adjust the lodestar to ensure that the fee ultimately awarded was
17 reasonable. By contrast, under the Johnson method, the "hours
18 claimed or spent on a case" were not "the sole basis for
19 determining a fee." Johnson, 488 F.2d at 717. Rather than
20 depending on market forces, the Johnson method relied on the

1 the level of skill required to perform the legal service
2 properly; (4) the preclusion of employment by the attorney due to
3 acceptance of the case; (5) the attorney's customary hourly rate;
4 (6) whether the fee is fixed or contingent; (7) the time
5 limitations imposed by the client or the circumstances; (8) the
6 amount involved in the case and the results obtained; (9) the
7 experience, reputation, and ability of the attorneys; (10) the
8 "undesirability" of the case; (11) the nature and length of the
9 professional relationship with the client; and (12) awards in
10 similar cases. Johnson, 488 F.2d at 717-19.

1 district court's experience and judgment. See id. at 718 ("[T]he
2 trial judge's expertise gained from past experience as a lawyer
3 and his observation from the bench of lawyers at work become
4 highly important"); id. at 720 (discussing the necessary
5 "balancing process"). Compare id. ("By this discussion we do not
6 attempt to reduce the calculation of a reasonable fee to
7 mathematical precision."), with Lindy, 487 F.2d at 167.

8 In theory, therefore, a district court that adopted the
9 lodestar method was expected to consider fewer variables than a
10 district court utilizing the Johnson method. In practice,
11 however, both considered substantially the same set of variables
12 -- just at a different point in the fee-calculation process. A
13 district court using the lodestar method would set the lodestar
14 and then consider whether, in light of variables such as the
15 difficulty of the case, it should adjust the lodestar before
16 settling on the reasonable fee it was ultimately inclined to
17 award. See, e.g., Silberman v. Bogle, 683 F.2d 62, 64 (3d Cir.
18 1982); Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208,
19 1217-18 (3d Cir. 1978) (permitting the district court to multiply
20 the lodestar by a "contingency factor" and accepting, in theory,
21 that obtaining an exceptional result might justify a further
22 upward departure from the lodestar). By contrast, a district
23 court employing the Johnson method would consider factors, such
24 as the difficulty of the case, earlier in the fee-calculation
25 process by weighing them in setting its tentative reasonable fee,

1 from which there would seldom be a need to depart. See, e.g., In
2 re First Colonial Corp. of Am., 544 F.2d 1291, 1299-1300 (5th
3 Cir. 1977) (outlining a process whereby first, the attorney
4 seeking fees would document the hours devoted to the case;
5 second, the district court would consider the Johnson factors and
6 set a reasonable hourly rate; and third, the district court would
7 explain how it balanced the Johnson factors to arrive at the
8 reasonable hourly rate).

9 The Supreme Court adopted the lodestar method in principle,
10 see Hensley, 461 U.S. at 433; Blum v. Stenson, 465 U.S. 886
11 (1984), without, however, fully abandoning the Johnson method.
12 Rather than using the attorney's own billing rate to calculate
13 the lodestar and then examining the lodestar in light of case-
14 specific variables to ensure that it was in fact a reasonable
15 fee, as the Third Circuit had suggested, the Supreme Court
16 instructed district courts to use a reasonable hourly rate --
17 which it directed that district courts set in light of the
18 Johnson factors -- in calculating what it continued to refer to
19 as the lodestar. See Hensley, 461 U.S. at 434 n.9 ("The district
20 court also may consider other factors identified in [Johnson]
21 though it should note that many of these factors usually are
22 subsumed within the initial calculation of hours reasonably
23 expended at a reasonable hourly rate.") (citation omitted)
24 (emphasis added); Blum, 465 U.S. at 898-900. The Supreme Court
25 collapsed what had once been a two-step inquiry into a single-

1 step inquiry; it shifted district courts' focus from the
2 reasonableness of the lodestar to the reasonableness of the
3 hourly rate used in calculating the lodestar, which in turn
4 became the de facto reasonable fee.

5 But the Supreme Court's emphasis on the Third Circuit's
6 economic model, see, e.g., Missouri v. Jenkins, 491 U.S. 274, 283
7 (1989) ("Our cases have repeatedly stressed that attorney's fees
8 . . . are to be based on market rates for the services
9 rendered."), and its simultaneous invocation of the equitable
10 Johnson factors at an early stage of the fee-calculation process,
11 proved to be in tension, see Blum, 465 U.S. at 895 n.11 ("We
12 recognize, of course, that determining an appropriate 'market
13 rate' for the services of a lawyer is inherently difficult . . .
14 [since m]arket prices . . . are determined by supply and
15 demand."). While the Third Circuit had expected district courts
16 to correct for market dysfunction, the Supreme Court now asked
17 district court judges to hypothesize that market on the basis of
18 their experience as lawyers within their districts and on the
19 basis of affidavits provided by the parties. Generally speaking,
20 the rates an attorney routinely charges are those that the market
21 will bear; yet the Supreme Court required that the district
22 courts conjure a different, "reasonable" hourly rate.

23 After Hensley and Blum, circuit courts struggled with the
24 nettlesome interplay between the lodestar method and the Johnson
25 method. Compare Rutherford v. Harris County, Tex., 197 F.3d 173,

1 192 (5th Cir. 1999) ("To decide an appropriate attorney's fee
2 award, the district court was first required to calculate a
3 lodestar fee depending on the circumstances of the case and the
4 Johnson factors. The court was next obligated to consider
5 whether the lodestar amount should be adjusted upward or
6 downward, depending on the . . . Johnson factors.") (emphasis
7 added), with Murray v. Weinberger, 741 F.2d 1423, 1430 (D.C. Cir.
8 1984) ("[T]he reasonable hourly rate which is incorporated into
9 the lodestar figure generally reflects the reputation and ability
10 of the attorney, the attorney's experience, and the level of
11 skill required for the particular case."), and Bebachick v. Wash.
12 Area Metro. Transit Comm'n, 805 F.2d 396, 404 (D.C. Cir. 1986)
13 ("Of course, 'the actual rate that applicant's counsel can
14 command on the market is itself highly relevant proof of the
15 prevailing community rate.'").

16 And the Supreme Court has not yet fully resolved the
17 relationship between the two methods. In cases decided after
18 Hensley and Blum, it has both (1) suggested that district courts
19 should use the Johnson factors to adjust the lodestar, see, e.g.,
20 Blanchard, 489 U.S. at 94 (stating that the district court should
21 arrive at an initial estimate and then "adjust this lodestar
22 calculation by other factors"); see also id. ("The Johnson
23 factors may be relevant in adjusting the lodestar amount . . .
24 ."); Pierce v. Underwood, 487 U.S. 552, 582-83 (1988) (Brennan,
25 J., concurring) (suggesting that factors might exist "that would

1 justify an enhancement of the lodestar”), and (2) reiterated its
2 holding in Hensley and Blum that “many of the Johnson factors
3 ‘are subsumed within the initial calculation.’” Penn. v. Del.
4 Valley Citizens’ Council for Clean Air, 478 U.S. 546, 564 (1986).

5 Our court has done little to resolve this confusion.
6 Compare Kassim v. City of Schenectady, 415 F.3d 246, 255-56 (2d
7 Cir. 2005) (affirming the district court’s authority to “reduce
8 the fee awarded to a prevailing plaintiff below the lodestar by
9 reason of the plaintiff’s ‘partial or limited success’”) (emphasis added),
10 with Luciano v. Olsten Corp., 109 F.3d 111, 116 (2d Cir. 1997) (“The product of the number of reasonable hours
11 times a reasonable hourly rate, however, does not end the inquiry. There remain other considerations, based on the facts
12 of the particular case, that may lead the district court to ultimately make an adjustment to the hourly structure.”) (internal citations omitted),
13 and McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 450 F.3d 91, 97 (2d Cir. 2006) (lodestar calculated on the basis of “prevailing rate
14 [specifically] for ERISA practitioners in this Circuit”) (emphasis added),
15 and Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1058 (2d Cir. 1989) (suggesting, in
16 determining the lodestar, that “smaller firms may be subject to their own prevailing market rate”).

17 The net result of the fee-setting jurisprudence here and in
18 the Supreme Court is that the district courts must engage in an

1 equitable inquiry of varying methodology while making a pretense
2 of mathematical precision. See Report of the Third Circuit Task
3 Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 247 (1985)
4 ("The Lindy process creates a sense of mathematical precision
5 that is unwarranted"). The "lodestar" is no longer a
6 lodestar in the true sense of the word -- "a star that leads,"
7 Webster's Third International Dictionary 1329 (1981). Nor do
8 courts use it in the way the term was first used by the Third
9 Circuit -- as a base amount that is susceptible of ready
10 adjustment; rather, circuit court deference to the district
11 court's estimate of a "reasonable" hourly rate is a "lodestar"
12 only in the sense that it is a guiding jurisprudential principle,
13 see Dague, 505 U.S. at 562 ("The 'lodestar' figure has, as its
14 name suggests, become the guiding light of our fee-shifting
15 jurisprudence."). What the district courts in this circuit
16 produce is in effect not a lodestar as originally conceived, but
17 rather a "presumptively reasonable fee." See id. (holding that
18 the fee applicant bears the "burden of showing that '. . . an
19 adjustment is necessary to the determination of a reasonable
20 fee'"). The focus of the district courts is no longer on
21 calculating a reasonable fee, but rather on setting a reasonable
22 hourly rate, taking account of all case-specific variables.

23 The district court's opinion, including the report and
24 recommendation of Magistrate Judge David R. Homer, with which the
25 district court agreed after de novo review, reflects the general

1 confusion surrounding the lodestar calculation. In places, the
2 district court appears to envision a two-step lodestar-
3 calculation process; yet elsewhere it seems to contemplate
4 undertaking the calculation in one step. Likewise, at times, the
5 district court emphasizes its role in approximating the workings
6 of the market, but it also suggests some difference between
7 "rates . . . paid by private retained clients . . . [and rates]
8 ordered by courts."

9 The meaning of the term "lodestar" has shifted over time,
10 and its value as a metaphor has deteriorated to the point of
11 unhelpfulness. This opinion abandons its use.⁴ We think the
12 better course -- and the one most consistent with attorney's fees
13 jurisprudence -- is for the district court, in exercising its
14 considerable discretion, to bear in mind all of the case-specific
15 variables that we and other courts have identified as relevant to
16 the reasonableness of attorney's fees in setting a reasonable
17 hourly rate. The reasonable hourly rate is the rate a paying
18 client would be willing to pay. In determining what rate a
19 paying client would be willing to pay, the district court should
20 consider, among others, the Johnson factors; it should also bear
21 in mind that a reasonable, paying client wishes to spend the
22 minimum necessary to litigate the case effectively. The district
23 court should also consider that such an individual might be able

1 ⁴ While we do not purport to require future panels of this
2 court to abandon the term -- it is too well entrenched -- this
3 panel believes that it is a term whose time has come.

1 to negotiate with his or her attorneys, using their desire to
2 obtain the reputational benefits that might accrue from being
3 associated with the case. The district court should then use
4 that reasonable hourly rate to calculate what can properly be
5 termed the "presumptively reasonable fee."

6 **II. The Forum Rule**

7 We turn now to the particular fee-calculation rule at issue
8 in this case. It was against the muddled legal landscape we have
9 just described that the Second Circuit promulgated what we will
10 call the "forum rule." The Supreme Court directed that district
11 courts should use the "prevailing [hourly rate] in the community"
12 in calculating the lodestar -- or what we are now calling the
13 presumptively reasonable fee. After Blum, we explained that the
14 "community" for purposes of this calculation is the district
15 where the district court sits. See Polk v. N.Y. State Dep't of
16 Corr. Servs., 722 F.2d 23, 25 (2d Cir. 1983).

17 However, district courts -- and indeed our court -- quickly
18 succumbed to the general confusion surrounding the difference
19 between a "lodestar" and a reasonable hourly rate. Sometimes,
20 they considered the variation between in-district and out-of-
21 district rates in setting the hourly rate (which they then used
22 to calculate the presumptively reasonable fee); but sometimes,
23 they considered that variation only in deciding whether to adjust
24 the presumptively reasonable fee after they had arrived at it (on
25 the basis of in-district rates). Compare Polk, 722 F.2d at 25

1 ("[T]he rate prevailing in the appropriate community is only one
2 of many factors bearing on determination of a fee award."), with
3 Arbor Hill II, 369 F.3d at 96-97 (intimating that a district
4 court should permit plaintiffs to recover more than a fee
5 calculated on the basis of the hourly rate usually charged by
6 attorneys in the forum district only if plaintiffs could "show[]
7 . . . that the case required special expertise beyond the
8 competence of [forum district] law firms").⁵

1 ⁵ Attorneys have had trouble understanding the strict forum
2 rule. For instance, in this case, Michael C. Lynch, counsel to
3 the Albany defendants, explained in an affidavit filed with this
4 court in Arbor Hill II that the "'relevant community' for
5 purposes of . . . [setting the hourly rate] is the Albany,
6 Capital District region in the Northern District of New York."
7 See also Farbotko v. Clinton County of New York, 433 F.3d 204,
8 209 (2d Cir. 2005) ("[T]he prevailing market rate for attorneys
9 in Syracuse and Albany . . . may not accurately reflect the rate
10 prevailing across the entire Northern District."). The district
11 court, by contrast, considered the "relevant community" to be the
12 entire Northern District of New York.

13 Confusion surrounding the forum rule is endemic, and not
14 unique to our circuit. Other circuits, too, have debated whether
15 to consider out-of-district rates in setting the reasonable
16 hourly rate or in setting the reasonable fee (after arriving at a
17 presumptively reasonable fee using in-district rates). Compare
18 Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, Minn.,
19 771 F.2d 1153, 1160 (8th Cir. 1985) (noting that the district
20 court should first "compute[] the base 'lodestar' figure by
21 multiply[ing] the number of hours reasonably expended times the
22 lawyer's regular hourly rate" and only then "look also to the
23 ordinary fee for similar work in the community") (internal
24 quotation marks omitted), with Kan. Pub. Employees Ret. Sys. v.
25 Reimer & Koger Assocs., 165 F.3d 627, 631 (8th Cir. 1999)
26 (readily upholding use of out-of-district rates in calculating
27 the presumptively reasonable fee). And those that have adopted a
28 comparatively strict forum rule have struggled to apply it. See,
29 e.g., Gates v. Deukmejian, 987 F.2d 1392, 1405 n.14 (9th Cir.
30 1992) (discussing whether to use Sacramento or San Francisco
31 hourly rates); McDonald v. Armontrout, 860 F.2d 1456, 1460 n.6
32 (8th Cir. 1988) ("We are not at all convinced that central
33 Missouri is the relevant 'community' [T]he argument for
34 an expansive reading of 'community' is particularly strong in a

1 We now clarify that a district court may use an out-of-
2 district hourly rate -- or some rate in between the out-of-
3 district rate sought and the rates charged by local attorneys --
4 in calculating the presumptively reasonable fee if it is clear
5 that a reasonable, paying client would have paid those higher
6 rates. We presume, however, that a reasonable, paying client
7 would in most cases hire counsel from within his district, or at
8 least counsel whose rates are consistent with those charged
9 locally. This presumption may be rebutted -- albeit only in the
10 unusual case -- if the party wishing the district court to use a
11 higher rate demonstrates that his or her retention of an out-of-
12 district attorney was reasonable under the circumstances as they
13 would be reckoned by a client paying the attorney's bill.

14 We believe that the district court's assessment of the
15 reasonableness of a prevailing party's decision to retain out-of-
16 district counsel is best considered in setting the hourly rate --
17 rather than in deciding whether to adjust a presumptively
18 reasonable fee -- for three reasons. First, our holding comports
19 with the holdings of several sister circuits and with the Supreme

1 case such as this, since Jefferson City is the capitol of the
2 state and lawyers from throughout the state have business
3 there."). Compare Grendel's Den, Inc. v. Larsen, 749 F.2d 945,
4 955 (1st Cir. 1984) (using county-based version of the forum
5 rule), with Cunningham v. City of McKeesport, 753 F.2d 262, 267
6 (3d Cir. 1985) (location of attorney's home office is the
7 relevant community), and Davis County Solid Waste Mgmt. & Energy
8 Recovery Special Serv. Dist. v. E.P.A., 169 F.3d 755, 759 (D.C.
9 Cir. 1999) (announcing an exception to the forum rule to govern
10 cases where "the home market is substantially less costly and the
11 site of the bulk of the legal work").

1 Court's focus on reasonable hourly rates rather than reasonable
2 fees. See, e.g., Blum, 465 U.S. at 895 (emphasizing the
3 importance of using the "market rate" in calculating attorney's
4 fees); Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 175
5 (4th Cir. 1994) ("In circumstances where it is reasonable to
6 retain attorneys from other communities . . . the rates in those
7 communities may also be considered."); Maceira v. Pagan, 698 F.2d
8 38, 40 (1st Cir. 1982) ("If a local attorney could perform the
9 service, a well-informed private client, paying his own fees,
10 would probably hire local counsel at the local, average rate.");
11 Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 769 (7th Cir. 1982)
12 (querying whether "the choice of counsel was improvident").

13 Second, in Pierce v. Underwood, a case interpreting the
14 attorney's fees provision of the Equal Access to Justice Act
15 ("EAJA"), the Supreme Court hinted that in the "broad spectrum of
16 litigation," the difficulty of obtaining local counsel competent
17 to prosecute a particular case is "little more than [a] routine
18 reason[] why market rates are what they are," 487 U.S. 552, 573
19 (1988) (emphasis added). The Supreme Court distinguished that
20 "broad spectrum of litigation" from the attorney's fees provision
21 of the EAJA, which stipulates that fees "shall be based upon
22 prevailing market rates" but "shall not be awarded in excess of
23 \$125 per hour unless the court determines that . . . the limited
24 availability of qualified attorneys for the proceedings involved
25 justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A)(ii); see

1 Pierce, 487 U.S. at 571-72; see generally Healey v. Rovner, No.
2 06-0525, Slip. Op. at *10 (2d Cir. Apr. 17, 2007).

3 Third and finally, our holding honors the Supreme Court's
4 emphasis on the need to use the approximate market rate for an
5 attorney's services in calculating the presumptively reasonable
6 fee. See Jenkins, 491 U.S. at 283. The legal communities of
7 today are increasingly interconnected. To define markets simply
8 by geography is too simplistic. Sometimes, legal markets may be
9 defined by practice area. See A.R. ex rel. R.V. v. New York City
10 Dep't of Educ., 407 F.3d 65, 80 (2d Cir. 2005) ("So long as the
11 law provides for or permits fee awards based on geographic
12 markets for services, a lawyer may be paid at different rates for
13 otherwise indistinguishable services."). On the other hand, many
14 cases (including many voting rights cases) are intrinsically
15 local, and the relevant legal market may be coextensive with or
16 smaller than the district itself. By asking what a reasonable,
17 paying client would do, a district court best approximates the
18 workings of today's market for legal services. See Malthur v.
19 Bd. of Trs. of S. Ill. Univ., 317 F.3d 738, 744 (7th Cir. 2003)
20 ("The realities of the legal community today mean that though
21 some attorney probably could have represented [the plaintiff],
22 one factor or another prevented them from taking the case when he
23 needed a lawyer."). Not incidentally, a reasonable, paying
24 client might consider whether a lawyer is willing to offer his
25 services in whole or in part pro bono, or to promote the lawyer's

1 own reputational or societal goals. Indeed, by focusing on the
2 hourly rate at which a client who wished to pay no more than
3 necessary would be willing to compensate his attorney, the
4 district court can enforce market discipline, approximating the
5 negotiation that might ensue were the client actually required to
6 pay the attorney's fees.

7 In occasionally permitting a deviation from forum rates in
8 setting the rate that will yield the presumptively reasonable
9 fee, we have in mind no substantial change in circuit law; where
10 circumstances have warranted it, we have not insisted on strict
11 adherence to the forum rule. In Polk, we approved the use of an
12 out-of-district hourly rate. 722 F.2d at 25 (considering whether
13 "[c]ounsel might . . . have expected plaintiff's claim to be
14 adjudicated in the Southern District"). In Agent Orange,
15 although we emphasized that district courts should generally use
16 "the hourly rates employed in the district in which the reviewing
17 court sits" in calculating the presumptively reasonable fee, 818
18 F.2d at 232, we again upheld a district court's decision to use
19 different rates.⁶ And since Polk and Agent Orange, we have urged

1 ⁶ Of the three cases cited in Agent Orange, two have since
2 been called into question to the extent they purport to require
3 strict application of the forum rule. Compare Chrapliwy, 670
4 F.2d at 768-69, with People Who Care v. Rockford Bd. of Educ.,
5 Sch. Dist. No. 205, 90 F.3d 1307, 1310 (7th Cir. 1996) ("The
6 attorney's actual billing rate for comparable work is
7 'presumptively appropriate' to use as the market rate."); compare
8 Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 139-40 (8th Cir.
9 1982) (en banc), with TCBY Sys., Inc. v. RSP Co., 33 F.3d 925,
10 931 (8th Cir. 1994) ("[Defendants] argue they should be awarded
11 the Minneapolis rate because they reasonably chose Minneapolis

1 district courts where appropriate to employ out-of-district rates
2 in calculating the fee due. See, e.g., New York City Dep't of
3 Educ., 407 F.3d at 81 & n.17 (“[T]here is good reason for a
4 district court not be wed to the rates in its own community. If
5 they are lower than those in another district, skilled lawyers
6 from such other district will be dissuaded from taking
7 meritorious cases in the district with lower rates.”).

8 In both Polk and Agent Orange, the touchstone of our
9 analysis was the belief that district courts should award fees
10 just high enough “to attract competent counsel,” Lewis v.
11 Coughlin, 801 F.2d 570, 576 (2d Cir. 1986). See, e.g., Agent
12 Orange, 818 F.2d at 233 (“Undercompensation could deny counsel
13 their right to fair and just fees; overcompensation would not be
14 consistent with the need to prevent windfalls.”);⁷ cf. Crescent
15 Publ'g Group, Inc. v. Playboy Enters., Inc., 246 F.3d 142, 151
16 (2d Cir. 2001) (explaining that an attorney-client agreement may

1 counsel after TCBY sued them. The [defendants] point out that
2 they are Minnesota residents who were forced to litigate the case
3 in Arkansas under the agreement’s forum selection clause, and
4 they were unfamiliar with Arkansas counsel [T]he district
5 court could have properly based the fee award on the higher
6 Minneapolis rates”).

1 ⁷ Indeed, Polk said that the panel was simply applying
2 established law. And when we decided Polk, circuit precedent was
3 clear that district courts had considerable flexibility in
4 setting the relevant legal community for purposes of determining
5 the hourly rate to be used in calculating the presumptively
6 reasonable fee. See, e.g., Cohen v. West Haven Bd. of Police
7 Comm'rs, 638 F.2d 496, 506 (2d Cir. 1980) (holding that the
8 district court should have looked to prevailing rates “in the
9 area”).

1 provide compelling evidence of the "prevailing market rate").⁸

2 We adhere to this touchstone, but we would not be true to it by
3 insisting on an overly strict application of the forum rule.

4 Rather, to reiterate, a district court should consider the rate a
5 reasonable, paying client would pay, and use that rate to
6 calculate the presumptively reasonable fee.

7 **III. The District Court's Decision**

8 For the foregoing reasons, we agree with plaintiffs that the
9 district court may have applied the forum rule too strictly.
10 They suggest that the district court calculated the presumptively
11 reasonable fee (on the basis of in-district rates) and then
12 queried whether the plaintiffs had shown sufficient cause to
13 rebut the presumption that it was, in fact, the ultimate
14 reasonable fee.

15 However, we find no error in the district court's fee award,
16 even when evaluated under the analysis we use. We are confident
17 that a reasonable, paying client would have known that law firms
18 undertaking representation such as that of plaintiffs often

1 ⁸ Were a strict forum rule the settled law of this circuit,
2 we could not have used a lower hourly rate than the hourly rate
3 prevailing in the district where the district court sat to
4 calculate the presumptively reasonable fee in Crescent
5 Publishing. See also Sands v. Runyon, 28 F.3d 1323, 1333-34 (2d
6 Cir. 1994) (permitting district court to consider retainer
7 agreement in setting hourly rate below prevailing hourly rate in
8 the district); cf. Pinkham v. Camex, Inc., 84 F.3d 292, 294 (8th
9 Cir. 1996). But see Reiter v. MTA New York City Transit Auth.,
10 457 F.3d 224, 233 (2d Cir. 2006) (vacating district court
11 judgment because district court used hourly rate set forth in
12 retainer agreement without considering prevailing Southern
13 District rates).

1 obtain considerable non-monetary returns – in experience,
2 reputation, or achievement of the attorneys' own interests and
3 agendas – that might cause them to accept such representation
4 despite a prevailing hourly rate that is lower than the law
5 firm's customary billing rates, and that the client would have
6 insisted on paying his attorneys at a rate no higher than that
7 charged by Albany attorneys (and there is no cross-appeal).

8 Moreover, the considerable deference that we owe to a
9 district court's assessment of the Johnson and other factors, see
10 Farbotko, 433 F.3d at 210 ("The district court is in closer
11 proximity to and has greater experience with the relevant
12 community whose prevailing market rate it is determining."),
13 counsels against remanding this case to the district court for
14 further, likely unnecessary, proceedings.

15 **CONCLUSION**

16 For the reasons set forth above, we AFFIRM the judgment of
17 the district court.